IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 79-208

ISAAC KAPLAN d/b/a INSJARL REALTY Co., for an Order Pursuant to Article 78 of the Civil Practice Law and Rules,

Appellant,

—against—

JEROME PRINCE, FRANK A. BARRERA, IRVING H. STOLZ, PAUL A. VICTOR, MARC A. GOODMAN, JACOB B. WARD, MARTY MARKOWITZ & ROBERT C. WEAVER, being the members of the CONCILIATION AND APPEALS BOARD, and the HOUSING AND DEVELOPMENT ADMINISTRATION,

Appellees.

ON APPEAL FROM THE
SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION—FIRST JUDICIAL DEPARTMENT

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

Appellant appeals from the New York Supreme Court, Appellate Division, First

Department, Order dated February 1, 1979, affirming without opinion the Supreme Court, New York County judgment entered July 14, 1978, denying Appellant's Article 78* application and dismissing the petition. The Court of Appeals denied Appellant leave to appeal by judgment entered May 10, 1979. Appellant submits this Statement to show that the United States Supreme Court has jurisdiction of the appeal and that a substantial question is presented.

Opinions Below

The Court of Appeals opinion dated May 10, 1979 (A-1)** has not yet been reported. The Appellate Division, First Department opinion, dated February 1, 1979, (A-6) is reported at 67 App. Div. 2d 1110, 412 N.Y.S.2d 717.

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* Article 78 of the New York State Civil Practice Law and Rules, in the nature of mandamus.

** Appendix references are cited by "A" and page numbers.

The trial court decision dated May 16, 1978* (A-13) and the resulting judgment filed July 14, 1978 (A-8), dismissing Appellant's Article 78 Petition, are unreported.

Jurisdiction

The judgment of the New York Court of Appeals was entered on May 10, 1979. A notice of appeal was filed with the Supreme Court, N.Y. County, August 8, 1979, ~~in ninety days of that date~~. The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by Title 28, United States Code, §1257(2)** and §2101(c).

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* N.Y.L.J. May 19, 1978, p.7, Col. 1 (Sup. Ct. N.Y. Co., Shainswit, J.)

** If the proper mode of review of this Appeal or any question presented herein is by petition for certiorari, Appellant respectfully requests that this Statement be regarded and acted on as a petition for writ of certiorari and as if duly presented to this Court at the time the Appeal was taken.

This appeal is properly before this Court under the principle enunciated in Minneapolis, St. Paul, and Sault Ste. Marie Railway Co. v. Rock, 279 U.S. 410 (1929).

Questions Presented

1. Whether rent control laws are an unconstitutional taking without just compensation to the landowner in violation of the Fifth and Fourteenth Amendments to the United States Constitution?

2. Whether a rent control law violates the United States Constitution, Article I, Section 10, (as applied), and the Fifth and Fourteenth Amendments (on its face and as applied) because:

(a) the law depends upon the existence of an emergency which did not exist at the time of the law's enactment and does not presently exist;

(b) the 5% or less vacancy rate standard for an "emergency" is

undefined, illusory and self-perpetuating;

(c) the law applies indiscriminately to all residential dwellings without distinguishing classes of housing where the rental and vacancy rates may be significantly higher;

(d) the law as applied to an owner, has required him to restore a service which, under the owner's leases with his tenants, is optional and would have had no effect on the rental rate?

3. Whether there is a denial of due process when:

(a) an administrative hearing officer does not prepare a detailed report in violation of the administrative tribunal's own rules;

(b) the administrative tribunal does not hear the testimony or listen to an available tape recording, no transcript of the testimony is made, no hearing

officer's report is prepared and the agency is not otherwise adequately informed of the proceeding?

4. Whether due process requires that a party to an administrative hearing be furnished with a draft opinion which, if adopted by the tribunal, will become the decision of the agency?

5. Whether an administrative agency's delay of two years and three months between hearing and decision is a denial of due process?

Statutes, Rules and Regulations Involved

New York City Administrative Code, Chapter 51, Title YY, the New York City Rent Stabilization Law (the "Statute" hereinafter),* §§8621, 8622, 8623, and 8625

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* §§YY51-1.0, YY51-3.0, YY51-3.1, YY51-4.0, YY51-6.0, a Savings Provision and the Powers of the Conciliation and Appeals Board are set forth at A-56-91.

of the New York State Unconsolidated Laws (A-92-100) known as the Emergency Tenant Protection Act of 1974, ("the Enabling Act" hereinafter) Sections 1, 2(m), 7, 8, 34, and 62 of the Amended Code of the Rent Stabilization Association of N.Y.C., Inc., (the "Code" hereinafter) (A-104), Rule 7 of the Rules of the Conciliation and Appeals Board (the "Rules" hereinafter). (A-118)

Constitutional Provisions Involved

United States Constitution:

> Article 1, Section 10, in part: "No State shall...pass any...Law impairing the Obligation of Contracts..."
>
> Fifth Amendment, in part: "No person shall...be deprived of life, liberty, or property, without due process of the law;"
>
> Fourteenth Amendment, in part: "No State shall...deprive any person of life, liberty, or property, without due process of law..."

New York State Constitution:

> Article One, Section Six, in part:

"no person shall be deprived of life, liberty, or property without due process of law."

The Rent Control Statutes

Rent control began in New York State in 1943. Since 1962, rent control has been under New York City's auspices.* Rent control only covered buildings built before 1947.

The New York City Council enacted "rent stabilization" on May 12, 1969 to cover the approximately 400,000 dwelling units built between 1947 and 1969.** In 1971, the New York State Legislature provided for decontrol of all voluntarily vacated rent control or rent stabilized apartments. In 1974, the Enabling Act

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* Title Y, New York City Administrative Code, Chapter 51.

** In multiple dwellings having 6 or more residences.

permitted rent stabilization to continue as to all previously stabilized apartments, all previously destabilized or vacancy decontrolled apartments, all rent controlled apartments thereafter vacated and dwelling units built between 1969 and 1973. Approximately 450,000 additional dwelling units became rent stabilized. In 1979, rent stabilization was once again continued. There are now approximately 800,000 rent stabilized dwelling units in New York City. The number is steadily growing as rent controlled apartments become vacant and are then stabilized.

Statement of the Case

The Factual Background

Appellant is the owner of a seventeen-story luxury apartment building located at 750 Park Avenue at 72nd Street in the heart of the high-rent district of Manhattan. The building's 68 residential apartments

are all rent stabilized. Built in 1955, the building is maintained in a style consistent with a luxury building.

The Rent Stabilization Association of N.Y.C., Inc. (the "Association") is a private membership association of owners of dwelling units covered by the Statute and the Code.*

The Statute empowers Appellee Conciliation and Appeals Board to receive and act upon complaints from tenants and certain applications by owners. (A-70)

Toward the end of 1974 and during the first six months of 1975,escalating costs, extraordinary expenses and a high

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* The Association is actually quasi-public. The thesis that membership is voluntary is untrue: a landlord is faced with the choice of maintaining membership in the Association and obeying the ukases of its executive arm, the Conciliation and Appeals Board (Appellee herein) or coming within the pythonic embrace of rent control.

vacancy rate resulted in Appellant's costs exceeding his income from the building. Seeking a statutory "hardship" rate increase was not the answer to Appellant's problem because he was having difficulty renting the vacant apartments at the then-existing stabilized rents. Instead, Appellant reduced costs by discharging the elevator operators and substituting a closed-circuit television security system in the elevators and at the service entrance, monitored twenty-four hours by the doorman. The elevators had always been automated. Under the terms of the leases in effect on or before May 31, 1968, Appellant was permitted to discontinue manually operated elevators without any change in the tenants' rent. Appellant gave the tenants notice of the substitution as required by the leases and informed them that manned elevator service would be available in the service ele-

vator from 8 a.m. to 5 p.m. upon request.

The Administrative Proceedings

Appellee directed Appellant to show cause before a hearing officer why Appellant should not be expelled from the Association* for removing elevator operators in violation of Appellee's 1971 Order (A-50) directing Appellant to maintain two elevator operators and a relief man as he had on May 31, 1968.**

The 1971 order resulted from tenant complaints that Appellant's removal of one shift of elevator operators violated §§2(m) and 62 of the Code (A-104) which provide that an owner shall not evade the stabilization rents or other Code requirements by,

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* Expulsion means the building is transferred to rent control, a more restrictive form of control.

** The significance of this date is explained below.

among other things, modifying the services furnished or required to be furnished with the dwelling units on May 31, 1968.

By affirmation of Appellant's attorney, Appellant opposed the proceeding on the grounds, among others, that Appellant would not be afforded a due process hearing before a hearing officer under Appellee's procedures, and that the Statute deprived Appellant of his property rights without a constitutional foundation.*

The two-day hearing lasted nearly seven hours. Only three tenants appeared and testified. At the outset of the hearing,

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* Issues as to bias of the hearing officer, the former enforcement officer who had previously informed Appellant that his action would violate the 1971 order, and as to the inapplicability of the 1971 order, were also raised below.

Appellant's attorney requested that a transcript be prepared and available to Appellee and to Appellant, emphasizing that Appellee, not the hearing officer, was to make the decision. Appellant's attorney also indicated that "the report", i.e., the hearing officer's report, "must be made available to any litigant."

A tape recording of the hearing was made, but no transcript.* No hearing officer's report was prepared as required by the Appellee's Rule 7. (A-118)

On January 12, 1978, two years and three months after the conclusion of the hearing, Appellee met at its once-weekly meeting to consider Appellant's case along

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* Appellant had a transcript prepared for himself after Appellee's decision was rendered.

with many others on its crowded calendar. Appellee did not give Appellant notice of the meeting. The hearing officer presented Appellee with a draft opinion in the form of a Compliance Order. Appellant had not been furnished with a copy of the draft opinion. Appellee voted to adopt the opinion as its order. Appellee did not hear the tape recording of the hearing and did not have the hearing officer's report required by its own Rules.

Appellee's Order (A-32) (a) directed Appellant to restore the elevator service required by the prior order, (b) fined Appellant $3,500 and (c) directed that Appellant's building be referred for inclusion under rent control if Appellant failed to comply within ten days after service of the order.

The Proceedings in the Courts Below

In January, 1978, Appellant sought judicial review of the Appellee's order in the New York State Supreme Court, New York County. In his petition, Appellant raised all of the substantive, due process and constitutional arguments that he had made at the administrative proceedings. He further argued that the hearing officer did not prepare a report as required by Appellee's own rules, and that Appellee did not weigh the evidence or become adequately informed of the proceeding because it never listened to the tape recording of the hearing.

Appellee's answer to Appellant's petition alleged, in part, that Appellant had not been prejudiced by a determination without a hearing officer's report because Appellee had the full record (i.e., the

tape recording and Appellant's attorney's affirmation) before it.

The Court dismissed the petition finding that Appellee's determination had a rational basis and was neither capricious nor arbitrary. (A-13) The Court did not discuss the due process and constitutional issues.

Appellant appealed to the Appellate Division, First Department, once again raising, by briefs and at oral argument, all the due process and constitutional issues he had raised below. On February 1, 1979, that Court unanimously affirmed the lower Court's judgment without opinion.

Appellant moved for reargument which was denied on March 13, 1979.

Appellant then moved in the Court of Appeals for leave to appeal from the Appellate Division's order. In his attorney's affidavit and in the accompanying

brief in support of the motion, Appellant once again argued that he had been denied a due process hearing and that the Statute is unconstitutional. Appellant's motion was denied without opinion by judgment entered May 10, 1979.

Subsequent Proceedings Not in the Record

Appellant did not immediately restore the elevator operators pursuant to Appellee's order, but applied to Appellee for a stay pending this appeal. On July 12, 1979, Appellee rejected Appellant's stay application and issued an Expulsion Order (A-18) terminating Appellant's membership in the Association and referring the building for inclusion under rent control at reduced rents unless Appellant complied with the earlier order within seven days. Appellant paid the $3,500 fine and restored the elevator operators.

The Questions Are Substantial

Introduction

The Rent Stabilization Law constitutes a taking without compensation to landlords who are prevented from collecting fair market rentals because of the law's rent restrictions. This raises a profound issue of deprivation of property without due process.

The so-called "emergency" that was declared in the aftermath of World War II to justify the imposition of rent control ceased long ago. When rent stabilization was enacted in 1969, there was no true emergency. Instead, the City Council merely declared an "emergency" without substantiating its finding:

> "The City Council hereby finds that a serious public emergency continues to exist in the housing of a considerable number of persons in the City of New York which emergency was created by war, the effects of war, and the aftermath of hostility; ...." (Section YY51-1.0; A-57).

There is a substantial question as to whether a rent control law which is based upon a declaration of "emergency" without factual basis, is constitutionally valid.

The Enabling Act sets a 5% or less vacancy standard for an emergency but does not define "vacancy rate," nor designate a body to determine the rate. This raises the fundamental questions of whether the "vacancy rate" is unconstitutionally vague and whether a legislature has unbridled discretion to repeatedly determine that an "emergency" continues to exist.

A substantial question also exists as to the manner in which rent stabilization has been applied to the Appellant, who has been forbidden to discontinue a service which he was permitted to discontinue without any change in the rent according to the leases in effect both before and after rent

stabilization.

Even if rent stabilization is constitutional, it is of the utmost importance that it be administered in a constitutional manner. If an administrative tribunal can compel a building owner to add unnecessary building services, which the owner was not required to furnish, without hearing the evidence, without a transcript of the hearing, without a hearing officer's report and without revealing how it otherwise became informed of the matter, the process is tyrannical. The owner becomes the hostage of the tenants, or even just one tenant.

Appellee has violated several of the fundamental principles of due process which an administrative agency must follow,* as well as other due process

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* See Morgan v. United States, 298 U.S. 468 (1936); Morgan v. United States, 304 U.S. 1 (1938); United States v. Morgan, 307 U.S 183 (1939); United States v. Morgan, 313 U.S. 409 (1941).

rights to which Appellant is entitled. The Appellate Division in Appellant's case has effectively sanctioned a "runaway" agency, one which totally abdicates responsibility to hear and determine to a hearing officer who is not accountable for his actions. The deprivation of due process here and the importance of preserving due process in administrative proceedings, raise substantial issues which warrant this Court's entertaining jurisdiction of this appeal.

The Rent Stabilization Law is Unconstitutional on Its Face: a Declaration of Emergency May Never Justify the Taking of Property Without Compensation; Moreover, There is No Rational Basis for a Finding That a Housing Emergency Has Persisted Since World War II

Although this Court has considered the constitutionality of rent control statutes and has been asked to consider the constitutionality of New York City's Rent

Stabilization Law, 8200 Realty Corp. v. Lindsay, 27 N.Y.2d 124, 313 N.Y.S.2d 733, 261 N.E.2d 647, appeal dismissed, 400 U.S. 962 (1970), Appellant knows of no case in which this Court has been asked to consider whether a rent control statute may work an unconstitutional taking of property, or whether the vacancy rate standard of a housing "emergency" is illusory.

A. The City Council's Declaration of Emergency Does Not Justify the Taking of Property Without Compensation.

The Rent Stabilization Law constitutes a pro tanto taking of property without compensation. Building owners, like Appellant, are prevented by rent regulation from receiving a fair and adequate return on their buildings. Hence, they do not receive any compensation -- no less just compensation -- for their losses. Instead, their losses increase, since their income falls far behind the ever-rising costs of

maintaining buildings in an inflationary economy.

As this Court stated during a time of serious national strife, basic constitutional rights may never be suspended even in times of emergencies. Ex Parte Milligan, 4 Wall.2 (1866):

> "No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government." 4 Wall.121

B. There is No Public Emergency; the Fact That the Law Was Promulgated Under the Guise of the Police Power Does Not Insulate the Law from Judicial Review

Rent controls were instituted in New York City in 1943 to combat what was perceived to be a serious housing "shortage"

resulting from World War II.* There is no basis in fact to support the City Council's declaration that the housing emergency "created" by World War II continued to exist both in 1969, the effective date of the statute, and in 1974, the effective date of the Savings Provision of the finding of emergency, or that the emergency "created" by World War II persists today -- over 30 years later. The finding is a sham and does not justify the imposition of controls and deprivation of property suffered by owners of rent stabilized buildings. See, e.g., Patterson v Daquet, 62 Misc. 2d 106, 308

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* In New York City, as in the rest of the United States, there was indeed no residential building from early 1942 until after August, 1945. But no New York housing was destroyed by war. What was perceived as a "shortage" of housing is better understood as a "shortage of apartments at pre-war rents." This is equivalent to declaring that there is a "shortage" of 5-cent newspapers, 20-cent hamburgers or 10-cent peanut butter, today. Moreover, rent controls do nothing to improve any (footnote continued)

N.Y.S.2d 173, 176 (Civil Ct., Kings Co. 1969), holding the Rent Stabilization Law unconstitutional.

Moreover, the lack of any controls on buildings built from 1947 to 1968 proves that the "emergency" ceased to exist. No new "emergency" arose in 1969. Legislation based upon a declaration of emergency must be invalidated where the emergency ceases to exist. Chastleton Corp. v. Sinclair, 264 U.S. 543 (1924) (Holmes, J.):

> "A law depending upon the existence of an emergency or other certain state of facts to uphold it may cease to operate if the emergency ceases or the facts change, even though valid when passed." 264 U.S. at 547-48 (Citations omitted)."

Accord, Milnot Co. v. Richardson, 350 F.

(cont). "shortage"; they do not add apartments. Rent controls just allocate apartments on a non-market basis.

Supp. 221, 223-24 (S.D. Ill. 1972).

The declaration of emergency and the enactment of the Statute were arbitrary and capricious exercises of the police power and thus are subject to judicial scrutiny. Kress, Dunlap & Lane, Ltd. v. Downing, 286 F.2d 212 (3d Cir. 1960):

> "That a legislative body cannot for all times insulate its determinations from judicial inquiry into the continued existence of the legislative facts upon which the constitutionality of the legislation is dependent is well settled." 280 F.2d at 215 (citations omitted).*

This Court should review the Rent Stabilization Law's "finding" of "emergency"

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* See also Milnot Co. v. Richardson, supra, 350 F. Supp. at 224. ("[T]he court is not at liberty to shut its eyes to a possible constitutional infirmity out of deference to [the legislature], when the validity of the law depends upon the truth of what is declared.")

which Appellant submits has no basis in fact.

C. The Vacancy Standard of "Emergency" Is Illusory; It Is Constitutionally Invalid

The Enabling Act sets a standard for an "emergency" of a 5% vacancy rate. This standard is illusory and self-perpetuating. Judicial review is imperative.

Vacancies in a rental housing market are a function of price. As long as rent controls keep rents below market, the vacancy rate will tend to be artificially depressed. For example, rent controlled tenants stay put for years, since their rents are well below market rate.*

*Tenants who retain apartments at artificially low levels deprive others of the opportunity to bid upon these apartments. There is, however, no rational basis to accord these renters such benefits. Moreover, the failure of these renters to compete in the market, as well as the fact that their apartments are made (footnote continued)

Thus, the vacancy rate standard inherently regenerates rent control. There is no end in sight. The perpetuation of rent control in the absence of "an emergency" is a usurpation of power under the guise of legislative wisdom. It works an unconstitutional deprivation of landlords' and tenants' rights and should be invalidated by this Court.

Moreover, both the Statute and the Enabling Act are unconstitutionally vague since they fail to specify any criteria for determining vacancy rates, or any procedure or body to make the determination.

A "vacancy rate" is a function of time. Yet, neither statute sets forth

(cont). unavailable to others, effectively -- and perpetually -- impedes "the transition from regulation to a normal market of free bargaining between landlord and tenant". (A-57)

the time period for which the rate is to be computed. How long must an apartment be vacant - one day; ten days; six months? The statutes do not answer the question.

Furthermore, although the Enabling Act provides that a housing emergency may be declared "as to any class of housing", the Statute does not define "class", or distinguish among the different classes of housing, which experience different vacancy rates. As to some classes, there is no public interest served by rent control and no "emergency" under the 5% vacancy rate standard.

There is no "shortage" of apartments in luxury buildings such as Appellant's, where rents range from upwards of $200 per room, per month. For example, as of September 30, 1975, there were eight vacant apartments in Appellant's building, a vacancy rate of 11.8% -- over six points above the statutory limit -- and, another apartment was to be vacated on October 1, 1975. As to this class of building, the Statute's broad sweep works an unconstitutional taking.

The Statute As Applied To Appellant Unconstitutionally Impairs Appellant's Contract Rights

Appellee's Order directing Appellant to restore an optional service is an unconstitutional application of the Statute and Code. All of the leases in effect on May 31, 1968, and every lease entered into thereafter, permitted Appellant to replace manned-elevator service with automatic-control type elevator service without any change in the rent. The Code (A-108, 117) and the Statute (A-71) require an owner to maintain only those services which he furnished or was required to furnish on May 31, 1968. This is to assure tenants that the stabilized rent established at the May 31, 1968 rate could not be indirectly evaded by a dimunition of services. Since under the terms of the lease, the nature of elevator service could not have affected the tenants' May 31, 1968

rent, and the tenants' right to manned or automatic elevator service was optional with the landlord, Appellant's substitution of a closed-circuit television system for manned elevators was not an evasion of those statutory provisions. Appellee's construction of the Statute and Code as requiring the maintenance of an optional service is surely an unconstitutional impairment of Appellant's contract rights. See Patterson v Daquet, supra., 62 Misc. 2d at 114, 308 N.Y.S.2d at 181.

There Is a Strong Public Policy and Constitutional Mandate Requiring Administrative Agencies to Abide by Their Own Rules

The fundamental principle that ours is a government of laws, not men, requires in every instance that an administrative agency follow its own procedures. Hammond v Lenfest, 398 F.2d 705, 715 (2d Cir. 1968). The failure of a quasi-judicial body to follow its own established

procedure is a violation of due process. United States ex rel. Accardi v Shaugnhessy, 347 U.S. 260 (1954), Service v Dulles, 354 U.S. 363 (1957), Vitarelli v Seaton, 359 U.S. 535 (1959).

Due process requires that agency regulations be followed even if they are more generous than the Constitution requires. Service v Dulles, supra; United States v Heffner, 420 F. 2d 809 (4th Cir. 1969). The doctrine of preventing arbitrariness in administrative proceedings is so strong that reversal of the agency's action is required even if it is likely that a new hearing will produce the same result. United States ex rel. Accardi v Shaughnessy, supra.; Yellin v United States, 374 U.S. 109 (1963); United States v Heffner, supra.

In the instant case, Appellee failed to follow its Rule 7 requiring the

hearing officer to prepare and submit to it, together with the record and such briefs as may be filed, a report setting forth, among other things, the substance of the application or complaint, the issues presented, the findings of fact based upon the entire record and a recommendation to Appellee for action by it. Appellee is then to prepare its own opinion setting forth its determination and the grounds and reasons therefor.

The hearing officer's report was particularly important in Appellant's case. The hearing lasted two days. The tape recording of the hearing was close to seven hours long. There was no transcript. Appellee has nine members, four representing "the public", four representing the

real estate industry and an impartial chairman.* They meet only once a week, hearing a large volume of cases each session. It is unfortunate (but not attributable to Appellant) that Appellee has no time to listen to tape recordings of lengthy hearings. Without compliance with its Rule 7, Appellee could not make a determination upon the evidence as due process requires. Appellant was therefore denied a hearing by the balanced tribunal contemplated by the Statute.

An Administrative Tribunal
Should Not Be a "Rubber Stamp"

Morgan v. United States, 298 U.S. 468 (1936), requires an administrative tribunal making a determination to consider and appraise the evidence no matter how onerous that might be. If that is not done,

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* §YY51-6.0(3) of the Administrative Code of the City of New York. (A-70)

a due process hearing has not been given. It is no answer to say that the evidence supports the findings and the findings support the order. The tribunal cannot abdicate its decision-making function to its staff or the hearing officer.

In this case, the Court need not (and, in any case, should not) probe mental processes. United States v Morgan, 313 U.S. 409 (1941). There was no transcript of the proceeding, no hearing officer's report, and no time taken for Appellee to hear the tape. Appellee could not have appraised the evidence. Nor can Appellee pretend that it gave Appellant a due process hearing simply because a record was made even if that record was a tape recording. A tribunal making a decision must address the evidence and conscientiously reach conclusions that are justified by the evidence. United States v. Morgan, supra., 298 U.S. at 481; see Weekes

v. O'Connell, 304 N.Y. 259, 107 N.E.2d 290 (1952); Kelly v. Monaghan, 9 A.D.2d 92, 191 N.Y.S.2d 632 (1st Dept. 1959). All Appellee did was "rubber stamp" the hearing officer's opinion as its official Order. This was surely a denial of due process.

A Hearing Officer's Report or Opinion Must Be Furnished to a Party Before an Administrative Decision is Rendered

The hearing officer's draft opinion in this case was "exclusive" of the record and should have been furnished to Appellant, as a requirement of a due process hearing.

This Court has uniformly applied the principle that an administrative tribunal must take nothing into account that has not been introduced in some manner into the hearing record. Ohio Bell Telephone v. Public Utilities Commission, 301 U.S. 292, 300 (1937); United States v. Abilene and Southern Railway Co., 265 U.S. 274, 288 (1924). This includes a hearing officer's report or, as in this case, a draft opinion.

Mazza v. Cavicchia, 15 N.J. 498, 105 A.2d 545(1954).

If the decision maker may stray at will from the record, the right to present evidence and to argue its significance at a formal hearing becomes meaningless. See Morgan v. United States, 304 U.S.1 (1937); Gonzales v. United States, 364 U.S.59 (1960). A party has the right to have the decision based exclusively upon the matters in the record which are known to him and can be controverted. He has the right not only to refute, but also to supplement, explain, and give different perspective to the hearing officer's view of the case. Schwartz, Administrative Law (1976); §135, p. 396-7.*

*The Federal Administrative Procedure Act codifies this principle by granting a party a reasonable opportunity to submit proposed findings and conclusions, exceptions to the decisions or recommended decisions of subordinate employees or to tentative agency decisions, and supporting reasons for the exceptions or proposed findings and conclusions. 5 U.S.C.A. §557(c).

In Mazza v. Cavicchia, supra, the New Jersey Supreme Court held that the failure to disclose the hearer's report violated the "exclusiveness" principle, even if the preparation of a hearing officer's report is not constitutionally required. See United States v. Morgan, supra, 298 U.S. at 478.

The New York Court of Appeals has considered this issue, limiting Mazza to the facts before it, i.e., that the hearing officer's report was statutorily required and that the party had requested it. Sorrentino v. State Liquor Authority, 10 N.Y.2d 143, 218 N.Y.S.2d 635 (1961).

This Court has not had the occasion to determine whether the "exclusiveness" principle extends to a hearing officer's report. The issue is a significant one in administrative procedure and should be finally determined by this Court.

Appellee's Inordinate Delay in Deciding Denied Appellant Due Process

Appellee's extraordinary delay of over two years and three months between the hearing and the decision raises a substantial question as to the denial of due process. Perez v. Lavine, 378 F. Supp. 1390 (S.D.N.Y. 1974); Nelson v. Sugarman, 361 F. Supp. 1132 (S.D.N.Y. 1972).

Delay dims the memory of the hearer and the decider. It places the litigants in limbo and lulls them into a false sense of the status quo. It is particularly pernicious where the ultimate order has retroactive effect.

Here, Appellee's Expulsion Order, (A.18), explicitly encourages tenants to apply for rent reductions because of the prior lack of manned elevator services. Had Appellee ruled promptly, there would have been no cause for suggesting rent.

reductions. Now, tenants will undoubtedly apply for, and Appellee will grant, rent reductions based upon the two-year period when there were no elevator operators. This is surely a denial of due process.

Appellee is notorious for its delays. It is time that it be directed to adhere to a schedule which assures due process. See White v. Mathews, 559 F.2d 852 (2d Cir. 1977), aff'g, 434 F. Supp. 954 (D. Conn. 1976), cert. denied sub nom Califano v. White, 435 U.S. 908 (1978).

Conclusion

It is submitted that each of New York's Courts which has reviewed Appellee's actions and Appellant's challenges to the Rent Stabilization Law, has failed to recognize the constitutional infirmity

of the statute (on its face and as applied) and the serious and far-reaching consequences of Appellee's failure to afford Appellant, and probably many others who have come before it, a due process hearing. We believe that the questions regarding price controls and administrative procedure presented by this appeal are substantial and of public importance.

Respectfully submitted,

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August 8, 1979